

# BOARD OF REGISTERED NURSING

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*Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

*— Business and Professions Code § 2708.1*

The Board of Registered Nursing (BRN) is a consumer protection agency within the California Department of Consumer Affairs (DCA). Pursuant to the Nursing Practice Act, Business and Professions Code section 2700 et seq., BRN licenses registered nurses (RNs), and certifies advanced practice nurses, including certified nurse-midwives (CNMs), nurse practitioners (NPs), registered nurse anesthetists (CRNAs), clinical nurse specialists (CNSs), and public health nurses (PHNs). In addition to licensing and certification, BRN establishes accreditation requirements for California nursing schools and reviews nursing school criteria; receives and investigates complaints against its licensees; and takes disciplinary action as appropriate. BRN's regulations implementing the Nursing Practice Act are codified in Division 14, Title 16 of the California Code of Regulations (CCR). As of 2021, BRN licenses over 450,000 RNs and certifies approximately 100,000 advanced practice nurses.

By law, the nine-member Board consists of four public members and five nurse licensees. The licensee members must include two direct-patient care nurses, an advanced practice nurse, a nurse administrator, and a nurse educator. Seven of the members (including all the RN members) are appointed by the Governor and two of the public members are appointed by the legislature. The Nursing Practice Act also requires BRN's Executive Officer to be a BRN licensee, a unique requirement among DCA boards.

On November 16, 2020, the Speaker of the Assembly, Anthony Rendon, [appointed](#) Susan Naranjo as a public member of the Board. Naranjo is the Public Affairs Director and staff executive team member of the Committee of Interns and Residents CIR-SEIU.

On March 2, 2021, Governor Newsom appointed Jovita Dominguez as a nurse educator member of the Board. Dominguez has been a Staff Nurse at Salinas Valley Memorial Hospital since 1987 and a Clinical Instructor for Hartnell College since 1999.

At this writing there are two vacancies on the Board to be appointed by the Governor—a direct patient care licensee member, and a public member.

At its March 16, 2021 [meeting](#) (Agenda item 5.0), the Board held a special election to fill the Board President vacancy after the departure of former President Michael Jackson from the Board. The current Vice President, public member Kenneth Malbrough, as well as licensee direct patient care member, Dolores Trujillo, were both nominated to fill the position. After hearing statements from both candidates, as well as public comment, the Board voted 4-3 in favor of Trujillo. Malbrough continues to serve as the Board's Vice President.

## HIGHLIGHTS

### **Nurses Contend with the Suspension of Regulatory Nurse-to-Patient Ratios**

On December 11, 2020, and again on January 24, 2021, Heidi W. Steinecker, Deputy Director of the California Department of Public Health (CDPH), announced a [suspension](#) of regulatory enforcement for hospitals that is valid until March 1, 2021. As COVID-19 continues to strain hospital capacity, the All Facilities Letters (AFL 20-26.4 and 20-26.5) detail temporary changes in licensing, hospital space, and staffing among other things. This suspension is pursuant

to Governor Newsom's March 2020 state of emergency [declaration](#) and [Executive Order N-39-20](#), which grants CDPH the right to temporarily waive hospital requirements during the state of emergency.

The suspension consists of several parts, all focused on relieving the hospital strain caused by a surge of patients and staffing shortages caused by COVID-19 cases. First, a hospital seeking a waiver must file with CDPH, but can start to provide patient care before CDPH confirms their specific waiver. Second, hospitals can now temporarily reconfigure hospital space and can apply to CDPH for more permanent structural modifications to account for the influx of patients. The third suspension describes the change in minimum nurse-to-patient ratios.

The nurse-to-patient ratio suspension gives hospitals two potential options: (1) apply for an Expedited Waiver Process, or (2) remain with the Existing Waiver Process. A hospital may now apply for an expedited waiver of minimum nurse-to-patient ratios if their hospital can show an increasing need to meet demand for surge either by regional surge or incoming transfers, daycare or school closures, COVID-19 staffing absenteeism for multiple reasons, or an emergency such as a fire or public safety power shutoff. A hospital must submit the waiver to CDPH, but the hospital can immediately implement alternative nurse-to-patient ratios before CDPH notifies them of approval. Unlike the Expedited Waiver Process, the existing waiver process does not allow hospitals to implement alternative nurse-to-patient ratios until they receive approval from CDPH.

Under the waiver, an intensive care unit can now have one nurse monitor three patients, instead of the minimum 1:2 nurse-to-patient ratio. Likewise, a step-down unit is approved for a nurse-to-patient ratio of 1:4, an emergency department is approved for a nurse-to-patient ratio of 1:6, and a surgical care unit is approved for a nurse-to-patient ratio of 1:7. These waivers will only be issued for sixty days, and CDPH may revoke a staffing waiver for hospitals unable to

demonstrate diligent efforts to recruit and retain staff. Thus far, according to news reports, about 190 hospitals have received waivers to increase nurse-to-patient ratios.

Many nurses, including the California Nurses Association, have been outspoken about the harm that will come from altering the nurse-to-patient ratios, arguing that the suspension will ultimately leave patients sicker and with less care than before. In addition, nurses have expressed that they are already overworked and exhausted because of the demands. Other options include canceling elective surgeries or other less dangerous solutions to the patient influx.

While BRN has yet to address the increased ratios, BRN has released an [expedited nurse licensure process](#) for certain refugees, asylees, and immigrants, which may assist in filling the healthcare provider gaps caused by the surge in COVID-19 hospital admissions pursuant to [AB 2113 \(Low\) \(Chapter 186, Statutes of 2020\)](#), effective January 1, 2021. On February 5, 2021, CDPH ended the expedited staffing waivers as COVID-19 hospitalization dropped.

## **Court of Appeal Grants Protective Order in Favor of the Board and Upholds Patient Privacy Rights**

*Board of Registered Nursing v. Johnson & Johnson et al.*, Case No. 30-2014-00725287 (Super. Ct., Orange County). On May 21, 2014, in *The People of the State of California v. Purdue Pharma, L.P., et al.*, the People of the State of California filed a [complaint](#) in superior court against several pharmaceutical companies alleging that defendants made false and misleading statements in the marketing of opioids, which minimized the risks of opioid medications and inflated their benefits. Plaintiff alleges this caused a public health crisis by dramatically increasing prescriptions, use, abuse, and even deaths related to opioids, all in violation of False Advertising Law, Unfair Competition Law, and public nuisance statutes.

In the course of litigation, defendants subpoenaed several healthcare-related boards, including BRN, for the production of business records regarding a wide range of documents. The request included all BRN documents related to opioid prescriptions, licensee discipline, and complaints over the past thirty years. On February 26, 2020, BRN moved for a protective order for relief from the broad obligations of the subpoena for the production of business records. BRN contended the records were confidential and would violate patient and licensee privacy rights. On March 10, 2020, the court [ordered](#) BRN to produce the list of nurses that have been disciplined and were allowed to prescribe, furnish or administer opioids, as well as all prescription records for opioids, antidepressants, and other specific drugs in the CURES database.

On April 3, 2020, BRN filed a petition for Extraordinary Writ of Mandate to vacate the production order. BRN argued that defendants did not provide notice to consumers that their personal information would be subpoenaed. On January 15, 2021, in *Board of Registered Nursing v. Superior Court of Orange County*, the Fourth District Court of Appeal issued an [opinion](#) reversing the lower court's order and granting BRN's motion for a protective order over the subpoenaed documents. In defense of the discovery subpoena, defendants argued that consumer notice does not apply to state agencies under the California Code of Civil Procedure section 2020.410. The appellate court disagreed, concluding that state agencies must give notice to consumers pursuant to California Code of Civil Procedure section 1985.4. Defendants failed to provide this notice to persons who would be impacted by the discovery.

The appellate court found that BRN was justified in refusing production, as defendants incorrectly sought personal data without following the lawful steps to obtain confidential information. The court further held in BRN's favor that the administrative records and data sought were too broad, violated privacy rights of record holders, and were not reasonably calculated to

lead to the discovery of admissible evidence. In addition to the right of privacy, the court held that both the deliberative process privilege and official information privilege protected overly broad requests of government information. The Fourth District Court of Appeal ordered the trial court to vacate its orders denying BRN's protective order, and instead, grant the protective order.

## **Board Undergoes Sunset Review**

On January 1, 2021, BRN published its [Sunset Review Report](#) in preparation for its Sunset Review Oversight Hearing before the Assembly Business and Professions Committee and the Senate Business, Professions and Economic Development Committee. The Board's enabling act, section 2700, et seq., of the Business and Professions Code is scheduled to be repealed on January 1, 2022, if it is not extended during the review. The review is a comprehensive process that allows the Senate to review all current policies and procedures of BRN and determine the Board's effectiveness at both licensee regulation and consumer protection.

BRN's report includes a history and summary of the Board's activities over the past four years and an overview of the Board's leadership. The bulk of the report contains performance measures and actions taken to rectify issues from the last sunset review. The report also identifies four new issues the Board would like the legislature to consider during this sunset review period. These issues include (1) implementing peace officer status for Board investigators, (2) providing Nursing Education Consultants with greater salaries, (3) amending Business and Professions Code section 2746.51 with non-substantive language changes, and (4) establishing additional fees. In this report, BRN indicated it is meeting the goals and objectives of its strategic plan, but also acknowledges the need for additional work regarding nursing program performance and case management time frames.

The Board seeks to provide BRN investigators with limited peace officer status. BRN requests this status for investigators as it will increase the access in which investigators can request criminal history and other evidence, as well as give the authority to criminally charge individuals who obstruct the investigative process. According to BRN, providing peace officer status will enhance the investigator's ability to protect the public from unsafe nursing, which is the Board's highest priority.

Of note, BRN recommends an establishment of nine different licensee fees to be statutorily constructed. These fees include a \$140 re-evaluation of international graduate application, a \$465 petition for early termination by stipulated settlement, and a \$1,170 petition for reinstatement with an administrative law judge. Accordingly, the total projected fees will bring \$1,169,306 in additional annual revenue. The new fees were recommended after an independent consultant group conducted a cost basis analysis to determine best practice for the new fees to be implemented.

In preparation for BRN's Joint Sunset Review Oversight hearing, the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business and Professions published a [background paper](#), which provides the Board's framework, updates the committees on the changes and improvements BRN made regarding the 11 issues from the previous sunset review, and identifies 38 new issues to raise with the Board during the sunset review process.

Among its listed concerns, the legislature asks whether BRN should be authorized to establish new fees, as the Board currently operates with a significant budget surplus. The legislature notes that in comparison to other boards, some of the proposed fees are unique to BRN, and others are much higher than other state boards.

Of particular note, the legislature asks what steps BRN has taken to rectify the State Auditor recommendations to address the prior BRN executives' data falsification regarding the number of complaints the Board handles, and instead ensure that investigators are not assigned more than 30 investigations at a time. [see [26:1 CRLR 61–63](#)] BRN reports that it is still in the process of fully implementing the original 2016 audit plan to eliminate the backlog of complaints.

The legislature also addressed the many complaints it has received from applicants concerning extended licensing processing timelines, which has prohibited individuals from entering the profession in an efficient manner. The background paper recommends that BRN reduce licensing processing timelines, as well as streamline out-of-state transferability, so that nurses who move to California can promptly begin working.

Amidst other recommendations, the background paper discussed how two recently passed pieces of legislation, [AB 890 \(Wood\) \(Chapter 265, Statutes of 2020\)](#) and [SB 1237 \(Dodd\) \(Chapter 88, Statutes of 2020\)](#), should be implemented, as questions remain regarding whether the Board has enough structure to successfully execute its part in the bill that creates greater independence for nurses to practice without physician supervision. According to AB 890, BRN must now implement an advisory committee consisting of licensees and physicians. The legislature concluded that the statute needs modified language to provide more specific instructions as to how BRN should establish such an advisory committee.

In concluding BRN's overall sunset extension status, the background paper states that while BRN has made progress concerning enforcement processes, the "progress was undermined by the misconduct of prior BRN executives" regarding the State Auditor's



recommendations. Ultimately, staff recommends that BRN should continue to regulate licensees with future legislative review of their regulation process.

The Board's [Joint Sunset Review Oversight Hearing](#) on March 12, 2021, was somewhat contentious. First, several members of both committees expressed concerns about the apparent instruction from the California Business, Consumer Services and Housing Agency, which oversees DCA, that no Board members should appear at the hearing. The Board's former Board President Michael Jackson's term ended approximately 10 days prior to the hearing when Governor Newsom appointed Jovita Dominguez to fill the Nurse Educator position on the Board. While Vice President, public member Ken Malbrough, had been preparing to testify, the members of the Business and Professions Committees were informed just prior to the hearing that he would not appear.<sup>1</sup>

Additionally, Deputy State Auditor Mike Tilden gave an overview of the identified issues the Audit Report had found. Tilden discussed that after the State Audit recommended BRN resolve its backlog of license complaints, BRN falsified data and misrepresented its caseloads to the State Auditor. Tilden also reported BRN does not use sufficient data to make decisions about the number of nursing student programs needed to adequately serve the population.

After this presentation, the Auditor addressed questions from the Joint Sunset Review Committee. Committee members discussed their concerns regarding the Board's culture that may have caused the untruthful audit behavior. They also discussed that the large number of high-priority complaints still pending does not adequately serve the public. After this discussion,

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<sup>1</sup> At the Board's March 16, 2021 [meeting](#), during his statement as a nominee for President, Mr. Malbrough confirmed that after he had spent a great deal of time preparing for the hearing, the Agency instructed him not to appear at the hearing. Malbrough expressed concern about this from a governance and public transparency standpoint.

the Board’s President, Loretta Melby, appeared on behalf of the Board and discussed the items found in the Board’s Sunset Report. Melby also fielded questions from the committee concerning the Board’s actions to rectify the State Auditor’s recommendations.

The committee heard comments from a number of public members as to the Board’s performance. The Center for Public Interest Law (CPIL) provided [written testimony](#) and [public comment](#) at the hearing, highlighting a number of consumer protection concerns. In addition to CPIL’s recommendation that the legislature thoroughly examine the State Auditor recommendations and charge the Board to implement them, CPIL also recommended that the Board’s Executive Officer be precluded from being a licensee to discourage anticompetitive conduct. To further prevent anticompetitive conduct, CPIL also recommended making the Board composition a public majority.

Members of the public testified that they have had difficulties with the barriers to become licensed. They urged the legislature to shorten the timeline for licensing. Another member of the public urged them to consider breaking barriers to employment for those who have expunged their criminal records from decades ago. A representative from the School of Nursing at San Francisco State University addressed the decreasing number of clinical placements and asked the committee to permanently increase the amount of non-direct patient hours to remedy the issue. The university representative cited examples of a number of studies that show that increasing the number of non-direct patient hours does not decrease the quality of education.

On April 9, 2021, the Board issued its [written responses](#) to the legislature’s background report. As to the legislature’s inquiry regarding the statutory requirement that the Executive Officer be a licensee of the Board, BRN responded that “the expertise of a licensed practitioner in the role of the BRN Executive Officer is extremely beneficial to understanding the intricacies

of the issues inherent in regulating the nursing profession,” and pointed out that 39 other nursing boards across the country have licensee members as Executive Officers. Also of note, BRN responded that it is “not opposed to simulation clinical training when done well and as an adjunct to direct patient care clinical training,” and that it could consider revising the 75/25 direct patient care to simulation ratio once the National Council for State Boards of nursing releases its data on this topic.

At this writing, the legislature has not yet amended the Board’s enabling act to extend the Board’s existence past the January 1, 2022 sunset date.

## LEGISLATION

- [AB 269 \(Patterson\)](#), as introduced on January 19, 2021, would add section 2811.1 to the Business and Professions Code to allow a licensee to receive a reduced renewal fee for licensure if they have practiced for 20 years or more in California, reached the age of retirement, and provide their services for free. According to the author, the bill would allow the state to continue to utilize nurses who are retired but wish to volunteer their services. *[A. B&P]*
- [AB 225 \(Gray\)](#), as introduced on January 11, 2021, would amend section 115.6 of, and add section 115.7 to the Business and Professions Code to authorize boards under the DCA, including BRN, to expand the duration of temporary licenses to spouses and partners of active-duty members of the military who currently hold a current and active license in another state from 12 months to 30 months after the date of issuance. The Board must investigate the licensee to determine whether a temporary license should be revoked. According to the author, who is also the sponsor, this bill addresses the needs of veterans and military spouse licensure by creating greater license portability. *[A. M&VA]*

- [AB 410 \(Fong\)](#), as amended March 25, 2021, would add Chapter 6.3 (commencing with section 2839) to the Business and Professions Code to enact the Nurse Licensure Compact. This compact would authorize BRN to coordinate licensing with the Board of Vocational Nursing and Psychiatric Technicians and allow both to issue a multi-state license to practice nursing or vocational nursing as specified. A nurse must already be eligible for a license and must submit biometric data to obtain any criminal history records before becoming eligible for the multi-state license. *[A. B&P]*

- [SB 213 \(Cortese\)](#), as amended on March 4, 2021, would add sections 3212.22, 3212.24, and 3212.26 to, and add and repeal sections 3212.21 and 3212.28 to the Labor Code to create rebuttable presumptions that infectious disease, COVID-19, cancer, and a series of other diseases and/or injuries are occupational injuries for a direct patient care worker employed in an acute care hospital and are therefore eligible for workers' compensation benefits. According to the bill's sponsor, the California Nurse Association, this bill will bring parity to worker's compensation by expanding the protections for frontline healthcare workers—the majority of which are women. *[S. Appr]*

- [AB 858 \(Jones-Sawyer\)](#), as introduced February 17, 2021, would add Article 2.7 (commencing with section 2820) of the Labor Code to allow nurses to override scientific algorithms for patient care if determined by the nurse to be insufficient for the patient's care. The bill would also prohibit a nurse from being penalized or discriminated against for overriding technology algorithms. According to the author, the bill was written to address a 2019 study showing algorithm bias in hospitals and aims to provide care in the best interest of the patient. *[A. Health]*

- [AB 1532 \(Committee on Business and Professions\)](#), as introduced February 19, 2021, would amend sections 2701, 2708, 2727, and 2786.3 of, and to add section 2701.5 to, the Business and Professions Code. According to the author, the bill currently only houses non-substantive changes but will be amended to address recommendations from the Joint Sunset Review Oversight Hearings of BRN. *[A. B&P]*
- [AB 1015 \(Rubio\)](#), as introduced February 18, 2021, would amend section 2717 of the Business and Professions Code to require BRN to incorporate regional forecasts into its biennial analyses of the nursing workforce, develop a plan to address regional areas of shortage identified by its nursing workforce forecast, and annually collect, analyze, and report information related to the number of clinical placements available for nursing students and the locations of those placements. According to the author, who is also the sponsor, the California State Auditor noted serious issues with BRN's oversight and approval of clinical nursing placements, and this bill would codify the State Auditor's recommendations for ensuring that licensure is efficient and better prepare the state to transition nursing students from the academic to the professional workforce. *[A. B&P]*
- [AB 1236 \(Ting\)](#), as amended April 15, 2021, as it applies to BRN, would add section 502 to, and repeal section 2717 of, the Business and Professions Code to require the Board to collect specific demographic information from its licensees, post de-identified, aggregate information on the data collected on its website, and transmit the data to the Office of Statewide Health Planning and Development beginning July 1, 2022. The bill would also repeal BRN's current data collection provision regarding future workforce planning. According to the author, expanding demographic information will help to serve diverse populations of California by identifying disparities. *[A. B&P]*

- [AB 1407 \(Burke\)](#), as amended March 18, 2021, would amend section 2811.5 of, and add section 2790 to, the Business and Professions Code to require a nursing program to include implicit bias within its curriculum. In addition, the bill would also require that a renewal of a license would require one hour of participation in an implicit bias course. The bill would also require a hospital to implement an implicit bias program for new hires. According to the author, implicit bias training will bring awareness to the issue and demonstrate that health care systems are committed to eliminating bias. *[A. Health]*

- [AB 852 \(Wood\)](#), as introduced February 17, 2021, would amend various sections of the Business and Professions Code to allow other healthcare professionals to refer patients to a nurse practitioner when a patient has rare and acute conditions and delete the requirement that physicians must first be consulted. According to the author, this bill assists in the implementation of [AB 890 \(Wood\) \(Chapter 265, Statutes of 2020\)](#), which allows nurses to practice without physician supervision. *[A. B&P]*